BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation Provisions	)	
of the Telecommunications Act of 1996	)	
	)	

COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC., SBC COMMUNICATIONS INC., AND THE VERIZON TELEPHONE COMPANIES ON SOUTHERN PUBLIC COMMUNICATION ASSOCIATION'S PETITION FOR A DECLARATORY RULING

INTRODUCTION AND SUMMARY

The Commission should deny the Petition for Declaratory Ruling filed by the Southern Public Communication Association ("SPCA"). The SPCA petition seeks to raise the same issues as the petition filed earlier this year by the Illinois Public Telecommunications Association ("IPTA"). Like IPTA, SPCA seeks refunds for payphone line charges paid by its members from April 15, 1997 through the effective date of current rates. SPCA also seeks a declaration as to "whether BellSouth was eligible" for per-call compensation during the same period.

I. All of the reasons counseling denial of IPTA's petition apply here as well. Indeed, SPCA's petition further illustrates that challenges to specific state commission orders, already subject to judicial review, are not an appropriate subject for declaratory relief. SPCA paid all of the payphone line charges at issue pursuant to a valid state tariff explicitly approved by the Mississippi Public Service Commission ("MPSC") in July 1997. The independent payphone providers' trade association in Mississippi had access to the cost data underlying that rate and failed to challenge it until more than six years later and after a new rate had gone into effect. Under those circumstances, the MPSC ruled that the SPCA could not maintain an action

for a refund in light of the bar against retroactive ratemaking and the filed rate doctrine. That ruling – and its application of general ratemaking principles – is subject to review in court, and the Commission should not address it. In any event, the MPSC's determination that SPCA's claim for refunds was barred is plainly correct under the circumstances.

II. The SPCA's petition regarding BellSouth's eligibility for per-call compensation should be denied for the reasons discussed in our earlier comments addressing the IPTA petition.[1] SPCA is not an appropriate party to raise this issue, and its arguments are, in any event, without merit.

BACKGROUND

The SPCA's petition challenges an order of the MPSC dismissing a complaint filed by the SPCA in December 2003.[2] The SPCA's complaint did not challenge BellSouth's current payphone line rates. Instead, the SPCA sought exclusively retrospective relief – that is, a refund of alleged "overcharges" that it had paid under BellSouth's prior payphone line rates.

The MPSC rejected the SPCA's claim as barred by the rule against retroactive rulemaking, by the filed rate doctrine, and by applicable statutes of limitations. On all points, the MPSC's reasoning was informed by the particular procedural history of the case. As the MPSC noted, the charges challenged by the SPCA had been paid under BellSouth's 1997 Pay

[1] *See* Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling, CC Docket No. 96-128, at 17-20 (FCC filed Aug. 26, 2004) ("Comments on IPTA Petition"); Reply Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association's Petition for a Declaratory Ruling, CC Docket No. 96-128, at 10 (FCC filed Sept. 7, 2004) ("Reply Comments on IPTA Petition").

[2] *See* Order, *Complaint of the Southern Public Communication Association for Refund of Excess Charges by BellSouth Telecommunications, Inc. Pursuant to Its Rates for Payphone Line Access, Usage, and Features*, Docket No. 2003-AD-927 (MPSC Sept. 1, 2004) ("9/1/04 Order") (Exhibit A to SPCA's petition).

Telephone Access Service ("PTAS") tariff. As the Commission is aware, after the *Payphone Orders* were released in 1997, there remained confusion concerning the scope of a LEC's obligation to file new tariffs for basic payphone lines in states where the LEC already had rates for such service on file. After the Common Carrier Bureau determined that LECs would be required to demonstrate that basic payphone line rates complied with the new services test, BellSouth (along with many other LECs) sought and received a brief extension in the form of a temporary waiver to allow BellSouth to complete any required filings without jeopardizing the eligibility of BellSouth Public Communications for per-call compensation. As a condition of that waiver, BellSouth agreed to make any new rates retroactive to April 15, 1997. Accordingly, BellSouth filed a new tariff on May 19, 1997, and the MPSC approved those rates on July 14, 1997,[3] effective as of April 15, 1997. *See* 9/1/04 Order at 2.

On June 17, 1997, before the MPSC approved BellSouth's tariff, the Gulf States Public Communications Council ("GSPCC"), the "SPCA's predecessor entity," *id.*, filed a motion to intervene in the proceeding out of time, which the MPSC granted. In its motion, the GSPCC argued that BellSouth had "not demonstrated that its rates offered to PSPs are cost-based and meet federal pricing guidelines." 7/14/97 Order at 3. The MPSC noted, however, that BellSouth had "file[d] cost data in support of its tariff filing," *id.*, which was made available to GSPCC, 9/1/04 Order at 2. Nevertheless, although the MPSC had invited the parties to "submit a jointly proposed procedural schedule in this matter," 7/14/97 Order at 4, no party pursued any challenge to the MPSC's approval of BellSouth's rates.

[3] *See* Order, *BellSouth Telecommunications, Inc., Notice of Tariff Filing for Flat Rate Option(s) Customer Provided Public Telephones and Smartline Service for Public Telephones*, Docket No. 97-UN-0302 (MPSC July 14, 1997) ("7/14/97 Order") (Exhibit B to SPCA's petition).

After the Commission released the *Wisconsin Order*,[4] BellSouth, with the agreement of the SPCA, voluntarily reduced its PTAS rates, effective October 1, 2003. The SPCA did not challenge those new rates, but instead filed a complaint seeking a refund of charges paid under the old rates. BellSouth answered and filed a separate motion to dismiss. After extensive briefing of the legal issues by the parties and after holding a hearing on the motion, the MPSC dismissed the complaint. The MPSC held that SPCA's claim for refunds would violate both the prohibition against retroactive ratemaking and the filed rate doctrine. *See* 9/1/04 Order at 4 (citing *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 127 So. 2d [404] (Miss. [1961]), and *United Gas Pipe Line Co. v. Willmut Gas & Oil Co.*, 97 So. 2d 530 (Miss. 1957)). In response to SPCA's argument that this Commission's *Wisconsin Order* (issued in 2002) was preemptive, the MPSC held that SPCA's claims could not "withstand scrutiny based upon the . . . *Wisconsin Order* itself." *Id.* Thus, the "FCC acknowledged that 'disparate applications of the new services test in various state proceedings' would occur"; moreover, "the FCC never directed or even discussed the issuance of refunds." *Id.* (quoting *Wisconsin Order*, 17 FCC Rcd at 2052, ¶ 2). The MPSC therefore rejected the notion that the *Wisconsin Order* could be read to deprive the MPSC's July 1997 order of its ordinary legal effect.[5]

Finally, the MPSC noted that "SPCA's failure to file its complaint until some six (6) years after [the MPSC] approved BellSouth's PTAS tariffs bars its Complaint under both federal and state statutes of limitation." *Id.* at 5.

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[4] Memorandum Opinion and Order, *Wisconsin Public Service Commission, Order Directing Filings*, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), *aff'd*, *New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2065 (2004).

[5] The MPSC also held that SPCA had provided no support whatsoever for its claim that BellSouth was "under a continuing duty to revise its rates." 9/1/04 Order at 4.

Accordingly, the MPSC concluded that SPCA did not "demonstrate any legal basis that justifies the relief it requests," and that "SPCA cannot circumvent [the MPSC's] lawful authority and the previously approved tariff rates." *Id.*

SPCA filed an appeal from the MPSC's order in the Chancery Court of the First Judicial District of Hinds County, Mississippi. After SPCA filed its appeal, the MPSC, jointly with BellSouth, removed the case to the United States District Court for the Southern District of Mississippi.[6]

ARGUMENT

BellSouth, SBC, and Verizon have already filed comments and reply comments in response to the earlier petition for declaratory ruling filed by IPTA. SPCA raises no new legal arguments, but instead merely reiterates or incorporates by reference points already discussed by IPTA and its supporters. Accordingly, we will not repeat our discussion from our earlier comments, which are already incorporated into this docket. Instead, we will focus on those issues raised by the circumstances in Mississippi, particularly as they reflect on the inappropriateness of the relief that both SPCA and IPTA seek.

I. THE MERITS OF A PARTICULAR STATE COMMISSION'S RESOLUTION OF AN INDIVIDUAL COMPLAINT IS NOT AN APPROPRIATE SUBJECT FOR A DECLARATORY RULING

We have already explained that the Commission has "broad discretion" in deciding whether to issue a declaratory ruling,[7] and that the exercise of that discretion to review individual state commission orders regarding payphone access line rates would be inappropriate for two reasons. First, the Commission has determined that state commissions are responsible for

[6] On December 1, 2004, SPCA filed a motion to stay and for a referral to this Commission on the basis of primary jurisdiction. The court has not yet resolved that motion.

[7] Order, *Petition of Home Owners' Long Distance, Inc. for a Declaratory Ruling*, 14 FCC Rcd 17139, 17145, ¶ 12 (CCB 1999).

ensuring that state payphone line rates conform with the requirements of 47 U.S.C. § 276; only if states are unable to carry out that function will the Commission take over that role.[8] Second, the determination of a state commission as to the appropriate relief to grant to a particular litigant in a particular case necessarily depends on the facts and circumstances of a particular claim. For that reason, such claims require "case-by-case" consideration, something that is inappropriate for a declaratory ruling proceeding of this kind.[9] *See* Comments on IPTA Petition at 8-10.

The SPCA petition further illustrates both of these points. The MPSC did exactly what the Commission asked of it, providing a forum for filing of BellSouth's PTAS tariff in 1997, which it reviewed and approved under federal-law standards. *See* 7/14/97 Order. When the GSPCC raised a question about whether BellSouth's tariff complied with the new services test, the MPSC granted the GSPCC leave to intervene out of time to pursue that claim. Ultimately, no party challenged the MPSC's approval of BellSouth's 1997 tariff. There is nothing more that the MPSC was required to do to fulfill the role that the Commission established for it. It would therefore violate principles of comity and collateral estoppel and go against the Commission's own prior orders for the Commission to interfere now.

Furthermore, the MPSC's decision here depends entirely on application of general ratemaking and filed rate principles to the particular circumstances of the litigation before that state commission, not to any determination regarding application of the new services test pricing standard. The GSPCC – SPCA's "predecessor entity" as the representative of independent payphone providers in Mississippi – intervened in the docket in which BellSouth's earlier PTAS

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[8] *See* Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21308, ¶ 163 (1996) ("*Order on Reconsideration*"); *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 16.

[9] Memorandum Opinion and Order, *Omnipoint Communications, Inc., New York MTA Frequency Block A*, 11 FCC Rcd 10785, 10789, ¶ 9 (1996).

tariff was considered, and was given access to the cost information underlying that tariff. GSPCC was free at that time or any time thereafter to pursue its argument that the 1997 tariff was inconsistent with the new services test. It failed to do so. Instead, it initiated a new proceeding – more than six years later and after BellSouth had already filed a new tariff – exclusively for the purpose of seeking a refund of amounts paid under an approved tariff that it had failed to challenge while it was in effect. The Commission has never addressed, and need not address, whether there is any basis to such a claim under such circumstances, or to similar claims raised under the circumstances present in any particular state.

As we have pointed out in our earlier comments, *see* Comments on IPTA Petition at 12-15, by determining that basic payphone line rates should continue to be tariffed in the states, rather than at the federal level, the Commission necessarily understood that any proceedings for enforcement of federal requirements would take place before state commissions, to be governed by state procedural rules, and with review as provided under state statute. As the MPSC rightly concluded, there is nothing in the *Payphone Orders* or the *Wisconsin Order* that addresses whether refunds should be ordered in particular circumstances.[10] The Commission therefore should not address this issue now; instead, it should leave the matter to resolution in individual state proceedings.

II. THE MPSC'S DETERMINATION IS PLAINLY RIGHT

BellSouth will fully address the merits of the MPSC's determination in the appropriate judicial forum. Nevertheless, it is plain from the text of the MPSC's order and the SPCA's petition that the SPCA's challenge is without merit.

[10] The *Bureau Waiver Orders* note that BellSouth and others agreed to make any tariff filings made pursuant to the Bureau's temporary waiver retroactive to April 15, 1997, by providing refunds if necessary. As noted, BellSouth complied with that commitment when it made its 1997 tariff, filed May 19, 1997, effective on April 15, 1997.

A. As the MPSC rightly emphasized, all of the charges that SPCA's members seek to recover were paid pursuant to a valid tariff that was reviewed and approved by the MPSC in 1997. In such circumstances, had *BellSouth* determined that the rate was inadequate, it could not have applied for a rate increase to make up past losses. By the same token, however, the state commission had no authority to reach back and modify the rates established in the 1997 tariff because SPCA now claims that they were too high. Rather, because ratemaking is a legislative function, any change in rate would have to be prospective. This is true as a matter of state law and under federal ratemaking principles as well. *See United Gas*, 127 So. 2d at 421 ("Rate-making is prospective and not retroactive."); *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370 (1932).

The filed rate doctrine leads to the same result. BellSouth's charges were governed throughout the relevant period by its 1997 tariff, which was reviewed and affirmatively approved by the MPSC.[11] BellSouth was obligated to charge, and its customers were obligated to pay, those rates and no others. The independent payphone providers had the opportunity to seek reconsideration of the order approving the tariff or to seek judicial review. They did neither. Nor did they file any action to seek prospective relief at any time. Instead, they waited until more than six years had passed to file a collateral attack on the MPSC's 1997 order. The filed rate doctrine forbids such a strategy. *See Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 615 (11th Cir. 1995); *Willmut Gas & Oil Co.*, 97 So. 2d at 535.

B. SPCA does not challenge the MPSC's determination that refunds were not permitted under state and federal ratemaking principles. Instead, it argues that the *Wisconsin*

[11] The tariff also requires customers to raise any challenge to billed charges within 60 days. *See* BellSouth General Subscriber Services Tariff § A2.5.5. That limitation period also barred SPCA's complaint.

Order requires the MPSC to entertain SPCA's claim for refunds. That argument fails, because the *Wisconsin Order* did not address any obligation to provide refunds for amounts paid under prior rates. Instead, the *Wisconsin Order* articulated a particular pricing standard under the rubric of the "new services test" that state commissions would be required to apply in evaluating BOCs' payphone line rates. But the SPCA does not question that BellSouth's current rates comply with the new services test. Accordingly, there is nothing further that the MPSC needs to do to enforce those requirements.

SPCA suggests that the MPSC's order denies the preemptive effect of the *Wisconsin Order*, but that is a flat misreading of the order. The MPSC found that SPCA's preemption claim failed "based upon the FCC's *Wisconsin Order* itself." 9/1/04 Order at 4. Thus, the MPSC found that because the Commission had "never directed or even discussed the issuance of refunds," *id.*, and because the Commission anticipated that different state commissions would apply the new services test differently, there was no federal law governing the refunds issue. As we have explained briefly above and at length in our earlier comments, *see* Comments on IPTA Petition at 12-17, that conclusion is correct, both with respect to the *Wisconsin Order* (upon which IPTA, for its part, did not even attempt to rely) and with regard to the Commission's earlier orders in this proceeding.

C. Nor is there any merit to the claim that BellSouth has somehow waived its defenses to SPCA's refund claim. *First*, the SPCA claims that BellSouth's reduction in its PTAS rates was a "tacit admission" that it had been out of compliance with the Commission's new services test. SPCA Pet. at 3-4; *see id.* at 8, 11-12 (same). This claim is without precedential support and is wrong. BellSouth's filing of new tariffed rates is immaterial to the question whether SPCA may demand a refund of charges paid under a valid tariff. The MPSC denied

SPCA's claim not because the 1997 tariff fully anticipated the requirements articulated in the *Wisconsin Order*, but because the state commission has no power to grant the type of retroactive relief that SPCA sought. Indeed, if the voluntary filing of a tariff could impose a refund requirement – when modification after a contested proceeding would not – no carrier would ever voluntarily update its tariff to reflect new developments.

Second, the SPCA claims that BellSouth affirmatively "waived" any application of state filed rate and retroactive ratemaking doctrines in letters that BellSouth's counsel sent to the FCC in 1997. *See id.* at 13-14. We have addressed these arguments before. *See* Reply Comments on IPTA Petition at 7-10. As we have explained, the RBOC Coalition's only commitment was to reimburse the difference between newly filed tariffs (*i.e.*, tariffs filed pursuant to the waiver order) and the tariff in effect on April 15, 1997. *See id.* at 8-9. The *Second Bureau Waiver Order*[12] simply reiterates the RBOC Coalition's voluntary commitment, limited in both relevant respects. *See* 12 FCC Rcd at 21376, ¶ 14, 21379-80, ¶ 20 (requiring reimbursement only for BOCs that "seek[] to rely on the waiver" and only "in situations where the newly tariffed rates are lower than the existing tariffed rates"). This is precisely what happened here: BellSouth relied on the waiver, filing its PTAS tariff on May 19, 1997, and it made its customers whole for that delay by agreeing that the new rate would be effective on April 15, 1997. BellSouth did exactly what it promised to do.

[12] Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370 (CCB 1997) ("*Second Bureau Waiver Order*").

II. THE COMMISSION SHOULD DENY SPCA'S REQUEST FOR A DECLARATION CONCERNING BELLSOUTH'S ELIGIBILITY FOR PAYPHONE COMPENSATION

SPCA's petition concerning BellSouth's eligibility for per-call compensation, like IPTA's petition on the same subject, should be denied. Like IPTA, SPCA does not claim to be a payor of per-call compensation and evidently raises this issue simply to gain leverage over BellSouth. Given SPCA's evident lack of standing, the Commission should exercise its discretion to dismiss its claim unaddressed.

In all events, BellSouth satisfied all of the requirements for eligibility for per-call compensation. *See Order on Reconsideration*, 11 FCC Rcd at 21293-94, ¶¶ 131-132. BellSouth had appropriate payphone service tariffs on file, and those tariffs were approved by the MPSC. The MPSC's approval of those rates has never been challenged. Nothing more was required for BellSouth to comply with the eligibility requirements contained in the Commission's orders.

CONCLUSION

The Commission should deny the petition.

Respectfully submitted,

__/s/ _____
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